Supreme Court, U.S.
FILED

02 369 AUG 15 2002

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

JOHN CHARLES SUTHERLAND,

Petitioner,

v.

CITY OF BIRMINGHAM,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

Linda L. Cole
Counsel of Record
1220 16th Street South
P.O. Box 55536
Birmingham, AL. 35255
(205) 933-2100

Carey W. Spencer, Jr.
2070 Valleydale Road
Cahaba Building II,
Suite 6
Birmingham, AL. 35244
(205) 989-1608

Counsel for Petitioner

BEST AVAILABLE COPY

20 pp

QUESTIONS PRESENTED

1. Whether a municipal police officer's use of a drawn gun for "all" felony arrests or the police officer's use of a drawn gun at close range pointed to the head of an unarmed suspect in this particular arrest constitute excessive force in violation of the Fourth Amendment of the United States Constitution.

2. Whether a municipal police officer's warrantless arrest was without probable cause and in violation of the Fourth Amendment of the United States Constitution.

3. Whether the Supreme Court of Alabama denied Petitioner a trial by jury, due process, and equal protection under the United States Constitution by reversing a jury decision in favor of Petitioner for excessive force and finding as a matter of law that the municipality was not liable.

4. Whether the Supreme Court of Alabama denied Petitioner a trial by jury, due process and equal protection under the United States Constitution by affirming the lower court's judgment as a matter of law holding that a municipal police officer had probable cause to make a warrantless arrest and Petitioner was not falsely arrested and imprisoned when the facts surrounding the arrest were overwhelming in dispute.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that he has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Barlow v. Ground 943 F.2d 1132 (9th Cir, 1991) 8

Graham v. Connor, 490 U.S. 386 (1989) 8

Jacobs v. City of Chicago, 215 F.3d 758 (7th Cir. 2000) .. 7,8

Lewis v. City of St. Petersburg, 260 F.3d 1260 (11th Cir 2001) 11

Perrin v. Genter, 177 F.Supp.2d 1115 (D.Nev.2001) 11

Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000) 8

Ornelas v. United States, 517 U.S. 690 (1996) 12

Reed v. Hoy, 909 F.2d 324 (9th Cir. 1989) 8

Robinson v. Solano County, 278 F.3d 1260 (9th Cir. 2001) 11

Tennessee v. Garner, 471 U.S. 1 (1985) 8

Constitutional and Statutory Provisions:

U.S. Const. art. VI, cl. 2 1

U.S. Const. Amend IV 2,11

U.S. Const. Amend VII 2

U.S. Const. Amend XIV 2

Code of Ala. §6-6-20 (1975) 3

Code of Ala. §6-5-338 (1975) 3,7

Code of Ala. §11-47-190 4,7

PETITION FOR WRIT OF CERTIORARI

PRAYER

The Petitioner, John Charles Sutherland, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App. 1-19) is not yet released for publication.

JURISDICTION

The Supreme Court of Alabama's judgment was entered on March 29, 2002. A timely petition for rehearing was denied on May 17, 2002 (App. 20). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States provides in relevant part: "This Constitution, and the laws of the United States * * * shall be the supreme law of the land * * * any thing in the Constitution or laws of any state to the contrary notwithstanding."
U.S. CONST. art. VI, cl. 2.

The Fourth Amendment of the United States Constitution provides in relevant part: "The right of the people to be secure * * * against unreasonable searches and seizures * * * ."
U.S. CONST. Amend. IV.

The Seventh Amendment of the United States Constitution provides in relevant part: "[T]he right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
U.S. CONST. Amend. VII.

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
U.S. CONST. Amend. XIV §1.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to probable cause to make an arrest, excessive force, equal protection, and right to trial by jury.

Petitioner filed an action on December 22, 1998 against the City of Birmingham ("City"), a local bank and a bank employee for false imprisonment, defamation, public ridicule, use of excessive force, assault and battery, and negligent/wanton acts committed after an incident that occurred on June 27, 1997 in the lobby of a bank branch on Birmingham's Southside.

After extensive discovery, Petitioner, the bank and the bank's employee filed a Joint Motion To Compel Mediation on July 17, 2000. The City objected to participation in mediation on the grounds that the City had no liability. The trial court ordered mediation pursuant to Code of Ala. § 6-6-20 (1975) on August 14, 2000.

Thereafter, Petitioner settled his claims against the bank and the bank's employee, and the parties filed a Consent Stipulation for Pro Tanto Dismissal on September 7, 2000. A Pro Tanto Order of Dismissal was entered by the trial court on September 8, 2000. As a part of the settlement, the parties entered into a confidentiality agreement.

Prior to the Mediation Order, the City filed a Motion for Summary Judgment and a brief in support thereof. The City claimed that as a matter of law it was entitled to a judgment because (a) the arresting officer was exercising a discretionary function and therefore the municipality had immunity under Code of Ala. § 6-5-338 (1975); (b) that a municipality was not liable for wanton or willful acts of its employees; and (c) that the arresting officer had probable cause to "detain" Petitioner.

Petitioner filed a Response and Memorandum Brief in Opposition to the City's Motion for Summary Judgment and argued that he had presented substantial evidence sufficient to create a genuine issue of material fact on the issues of whether or not he had been arrested, whether or not the arresting officer had committed any negligent acts or exceeded his authority, and whether or not the City had absolute immunity for all negligent acts committed by its police officers. Petitioner raised the Constitutionality of these action at this time (App. 25-39)

On October 31, 2000, the trial court entered an order granting a partial summary judgment in favor of the City on all of the Petitioner's claims except the claims for neglect, carelessness or unskillfulness pursuant to Code of Ala. § 11-47-190 (1975). Petitioner again raised the Constitutional issues. (App. 21)

The City filed a motion on November 6, 2000 asking the trial court to reconsider the summary judgment. In addition, the City filed a supplemental pleading concerning its motion to reconsider and for the first time in this case attempted to support its position with an affidavit of the arresting officer, Michael Wooten. The record reflects that there was no ruling on the City's motion to reconsider prior to trial.

The City next filed an Emergency Motion to Stay Proceedings with the trial court just four days prior to the trial setting. The City also filed a Petition for Writ of Mandamus and Emergency Motion to Stay with this Court on January 17, 2001, in "Ex Parte City of Birmingham" (In re: John Sutherland v. Colonial Bank, et

al) - Case number 1000687. An order denying the emergency motion and the petition was entered by this Court on January 22, 2001 and filed with the Circuit Clerk of Jefferson County on January 24, 2001.

This case was tried before a struck jury on January 21, 2001 through January 25, 2001 before the Honorable T. M. Smallwood, Jr.

Petitioner orally amended his complaint at the close of the evidence, over the objection of the City, and claimed that the arresting officer's acts, while employed by the City of Birmingham on June 27, 1997, were negligent assault and battery, negligent false arrest and false imprisonment and negligent use of excessive force, and that as a proximate consequence, he was damaged.

At the close of the Petitioner's case, the City made an oral motion for a judgment as a matter of law and directed verdict, which was overruled by the trial court. The City renewed its motion at the close of its case which was overruled.

The trial court ruled at the close of all of the evidence that, as a matter of law, the Birmingham police officer, Michael Wooten, had probable cause and acted within his authority in arresting Mr. Sutherland. The trial court also held that, as a matter of law and fact, that a police officer could do "something legally but do it in an illegal way." Petitioner again raised the Constitutional issues. (App. 41-43E)

The case was submitted to the jury on the issues of negligent assault and battery and negligent use of excessive force.

The jury returned a verdict in favor of Petitioner and against the City in the amount of $115, 000.00 less the amount paid by the bank of $50,000.00. The trial court entered a judgment against the City in the amount of $65,000.00 plus court costs on the jury's verdict on February 23, 2001.

The City filed a post judgment motion entitled "Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion to Vacate Verdict or, in the Alternative Motion for Judgment Notwithstanding Verdict, or in the Alternative Motion for a New Trial" on February 23, 2001. Thereafter, the City filed an amendment to its post trial motion. The Trial Court entered an order overruling the City's post trial motions on March 27, 2001.

A Notice of Appeal was filed by the City on April 23, 2001. Petitioner filed a Notice of Cross-Appeal on May 7, 2001 on the issue that the trial court erred in determining that the arresting officer had probable cause. Petitioner again raised the Constitutional issues in his brief.

On March 29, 2002, The Supreme Court of Alabama reversed the judgment in favor of Petitioner and affirmed the judgment for the City on the probable cause issues.

Petitioner timely applied for rehearing. Petitioner's rehearing was denied on May 17, 2002. Petitioner again raised the Constitutional issues in his brief. Specifically saying:

Sutherland respectfully requests oral

argument in this matter. The opinion of this Court is inconsistent with the trial testimony, with existing Alabama case law, with existing federal law and with the Constitutions of the United States and the State of Alabama. Moreover, there continues to be a substantial conflict in Sections 11-47-190 and 6-5-338 Ala. Code 1975 and subsequent case law that has not been reconciled with the holding in this case. In addition, this opinion will have a significant impact on every citizen in this state in that it greatly diminishes a citizen's constitutional right against unreasonable searches and seizures.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Alabama's ruling is in error and repugnant to the Constitution of the United States.

The Fourth Amendment of the Constitution does not permit police officers to draw their weapon on every felony arrest. At the minimum, a reasonableness standard applies as to when a police officer can draw and point a loaded weapon at someone.[1] Police officers do

---

[1] The City tried to make light of its officer pulling the gun and pointing it at Mr. Sutherland, as the Court stated in Jacobs

not have the authority or discretion to use any method that they deem appropriate to effectuate an arrest. See Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989) (claims of excessive force, both deadly and nondeadly, are governed by the objective reasonableness standard). The question of reasonableness in the use of force is normally an issue for the jury. Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000); Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), cert denied, 115 S.Ct. 1097 (1995); Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991); Reed v. Hoy, 909 F.2d 324 (9th Cir. 1989), cert. denied, 111 S.Ct. 2887 (1991). "Because questions of reasonableness are not well suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." Chew citing Barlow, 27 F.2d at 1440. In determining reasonableness, all factors are considered, to include: whether there was a warrant, whether the person resists arrest or is armed, whether the individual is sober, whether other exigent factors exist, whether more than one arrestee or officer are involved and the nature of the charges. Id.

Here, none of the factors requiring force were

---

v. City of Chicago, 215 F.3d 758 (7th Cir 2000), it is serious. It is a reasonable inference that the act of pointing a loaded weapon at a person under these circumstances carries with it the implicit threat that the officer will use it.

present. The police officer (App. 103-07)testified as follows:

Q. So is your testimony on all felony arrests?

A. Yes, sir. It is my standard approach to pull my weapon on all felony arrests, yes sir.

Further, the evidence was as follows:

1. When the City's police officer arrived at the bank, there was no claim that a robbery was in progress.

2. When the City's police officer arrived at the bank, there was not any information that an assault was in progress.

3. When the City's police officer arrived at the bank, there was not any information that an assault had occurred.

4. When the City's police officer arrived at the bank, there was no claim that any type of violence was either in progress or had occurred.

5. There was no information that the bank manager felt threatened.

6. There was no information that the bank manager had been attacked or was about to be attacked.

7. There was no information that an armed person was in the bank.

8. There was no indication to the City's police officer that the situation at the bank was a charged one.

9. When the City's police officer entered the bank, Mr. Sutherland was standing outside of the manager's office and did not look suspicious.

10. When the City's police officer entered the bank

manager's office, he was standing by a table and did not appear to be threatened.

11. While the City's police officer was in the bank, nobody appeared to be in any type of fear or to be threatened.

12. The bank manager did not tell the City's police officer that he was threatened by Mr. Sutherland.

13. The bank manager did not tell the City's police officer that Mr. Sutherland had made any actions or threats toward him.

14. The bank manager did not testify that Mr. Sutherland was in the bank that day attempting to cash any forged instruments.

15. The City's police officer walked outside of the bank manager's office, drew his weapon and stuck the 40 caliber Glock in Mr. Sutherland's face.

16. Mr. Sutherland thought he was about to be shot. (App. 81-97)

17. Mr. Sutherland testified that the City's police officer kept shouting and yelling and then the police officer twisted and rachetted Mr. Sutherland's arm behind his back in an excruciating manner causing him pain as he was handcuffed. (App. 81-97)

18. Mr. Sutherland was handcuffed and left in the bank lobby for 15 to 20 minutes. The handcuffs caused bruising and a possible pinched nerve. Mr. Sutherland's hand stayed numb for about two months. (App. 81-97)

19. The City's police officer pulls his gun on all felony arrests. Further, it was his understanding that he could pull his gun on all felony arrests.

Despite the totality of these circumstances, in the end, the Supreme Court of Alabama not only took the question away from the jury, it reversed the judgment entered below.

The Court's decision jeopardizes all citizens of the State and potentially subjects them to facing a loaded gun pointed at their face regardless of the totality of the circumstances.

Further, conflict between the States and Circuits exists on when an Officer may pull his weapon and whether effecting the arrest is an operational task or a discretionary function. See Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2001); Lewis v. City of St. Petersburg, 260 F3d. 1260 (11th Cir 2001). See also Perrin v. Gentner, 177 F.Supp.2d 1115 (D.Nev.2001) (the police officer used discretion when deciding to stop Perrin; however, when the police officer used deadly force in furtherance of the stop, that was an operational function rather than a discretionary function).

While it is undisputed that Officer Wooten made a warrantless arrest of Sutherland on June 27, 1997 at Colonial Bank, there was conflicting testimony as to whether or not Wooten had probable cause to a make a warrantless arrest under the facts and circumstances known to him at the moment of arrest.

An essential protection for citizens in our democracy is "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const.

Fourth Amend. While Alabama Law permits a police officer to arrest an individual without a warrant for a felony if the officer has probable cause, the officer must still satisfy the standards required by the Fourth Amendment.

The standard to establish probable cause has historically been the reasonable man standard. While the standard is difficult to precisely articulate, sufficient facts and information must be available to a police officer, exercising reasonable caution in the belief that a crime has been committed or is being committed at the moment of arrest. As such, the question of probable cause is a mixed question of law and fact. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657 (1996).

In the instant case, the testimony was substantially disputed surrounding the facts of the arrest. Officer Wooten had only a police dispatch that there was a suspicious person in the bank that may be suspected of a prior forgery and a nod of the head or finger pointing by the branch manager that Sutherland was the purported suspect. While Wooten claimed he actually went into the bank manager's office and looked at the counterfeit checks and talked with the manager before he arrested Sutherland, the bank manager and Sutherland both testified that Wooten did not talk to the manager or look at the checks before he drew his gun, handcuffed and arrested Mr. Sutherland.

Based upon the evidence, the court was wrong to take the questions of false arrest and false imprisonment from the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this the 15th day of August 2002.

LINDA L. COLE
Attorney for Petitioner
Post Office Box 55536
Birmingham, Alabama 35255-5536
(205) 933-2100

CAREY W. SPENCER, JR.
Attorney for Petitioner
2070 Valleydale Rd., Ste. 6
Birmingham, Alabama 35244
(205) 989-1608

APPENDIX

The Appendix is bound in a separate volume.

CERTIFICATE OF SERVICE

I, Linda Cole, do swear or declare that on this date, August 15, 2002, as required by Supreme Court Rule 29 I have served the Petition for Writ and

Appendix on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above in the United States mail properly addressed to each of them and with first-class postage prepaid as follows:

James D. Love, Esq.
John Eden, Esq.
City Law Department- City of Birmingham
710 North 20th Street
600 City Hall
Birmingham, Alabama 35203

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15th Day of August 2002.

Linda Cole